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In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND E.F., A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS NEW YORK, EQUIP FOR EQUALITY, AND AUTISTIC SELF ADVOCACY NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

Federal Cases:

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Tennessee v. *Lane*, 541 U.S. 509 (2004) 8, 9

State Cases:

Nichelle Drew v. *Villa Grove Cmty. Unit Sch.*, No. 2009-CH27 (Douglas Cty. Cir. Ct., IL 2009), *aff'd*, *K.D.* v. *Villa Grove Cmty. Unit Sch.*, 936 N.E.2d 690 (Ill. App. Ct. 2010) 22

Pending Cases:

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Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) 8

Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(*l*) 4, 10, 11, 12

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Legislative History:

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Federal Regulations:

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Miscellaneous:

Crane, Samantha, Legal Dir. & Dir. of Pub. Policy, Autistic Self Advocacy Network, Letter to Rebecca B. Bond, Chief, & Anne Raish, Acting Principal Deputy Chief, Disability Rights Section, Civil Rights Div., U.S. Dep't of Justice (Mar. 7, 2016), http://autisticadvocacy.org/wp-content/uploads/2016/03/ADA-Discrimination-Complaint-Against-Arlington-Public-Schools.pdf 23

King, Martin Luther, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march 7

Negrón, Jr., Francisco M., Gen. Counsel, Nat'l Sch. Bds. Ass'n, Letter to The Hon. Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., et al., (Mar. 5, 2015), https://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf 17

THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 8

U.S. Department of Justice & U.S. Department of Education, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (Nov. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf 16

Weber, Mark C., *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY, Iss. 2, 611 (2012) 17

Yeagle, Patrick, *Dog fight ends with hall pass: School admits second-grader with service dog*, ILLINOIS TIMES (Sept. 9, 2010), http://illinoistimes.com/article-7735-dog-fight-ends-with-hall-pass.html. 22

INTERESTS OF *AMICI CURIAE*

Amici and their members represent students with disabilities like E.F. who have been prevented from seeking the relief guaranteed to them under civil rights laws because of the misinterpretation of the statutory provision at issue in this case.[1] This brief describes the harms resulting from this misinterpretation.

The National Disability Rights Network (NDRN) is the non-profit membership association of protection and advocacy (P&A) and Client Assistance Program (CAP) agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories, with a Native American Consortium affiliate located in the Four Corners region. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN provides to its members training and technical assistance, legal support, and legislative advocacy. It works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education-related cases under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. Petitioners and Respondents have filed letters granting blanket consent to the filing of *amici* briefs.

and the Americans with Disabilities Act make up a large percentage of the P&A/CAP system's caseload, with over 10,000 such matters handled in the most recent year for which data is available. Limited resources prevent our agencies from accepting even greater numbers of potentially meritorious cases.

Disability Rights New York (DRNY) is the federally authorized P&A agency for people with disabilities in New York State. DRNY has helped thousands of children with disabilities obtain the education they are entitled to under the Individuals with Disabilities Education Act and enforce their rights under the Americans with Disabilities Act and Section 504. DRNY provides these services under federal laws that authorize it to protect and advocate for the rights, safety, and independence of people with disabilities.

Equip for Equality (EFE) is an independent, non-profit, civil rights organization and P&A agency for people with disabilities in Illinois. EFE's mission is to advance the human and civil rights of children and adults with physical and mental disabilities. To this end, EFE provides information, referral, self-advocacy assistance, and legal representation to people with disabilities throughout the state, with a focus on the rights of children with disabilities. EFE represents approximately 1,500 children with disabilities in disputes with school districts every year, devoting significant resources to ensuring children with disabilities are provided the accommodations and services they need to access school and society.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, non-profit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public poli-

cies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, promoting access to health care and long-term supports in integrated community settings, and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities. ASAN currently represents several public school students seeking relief under Title II of the Americans with Disabilities Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years, Congress has safeguarded the rights of children with disabilities to equal access, equal opportunity, and freedom from discrimination. Extending equal rights to those with disabilities reflects our national values, and aligns with the gradual expansion of civil rights and access to justice to other historically powerless segments of society.

This case is about the barriers children with disabilities face when attempting to enforce those civil rights. The decision under review, *Fry* v. *Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016), Pet. App. 1-35, and others like it in the First, Second, Third, Seventh, Tenth, and Eleventh Circuits, see Pet. 13; U.S. Br. on Cert. 18-19, reduces children with disabilities to second-class citizens in our system of justice when they seek relief for violations of their civil rights that

happen to occur during the school day. No such obstacle exists if children experience those violations *outside* the school context, or if schools violate the civil rights of *adults* or *non*-students with disabilities.

Congress expressly provided in the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), that when the "relief" a child with a disability "seek[s]" for a civil rights violation is not "available" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*, the child need not endure the futility of seeking that relief under the IDEA's administrative hearing process.

Despite the plain language of the HCPA, the Sixth Circuit and others have interpreted that law to impede a child from accessing justice through the court system if either the alleged violation or the relief sought even remotely "relate[s] to ... education[]." *Fry*, 788 F.3d at 625; Pet. App. 6; see also, *e.g.*, *Charlie F.* v. *Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996) (exhaustion under the IDEA required if claim "deals with acts that have both an educational source and an adverse educational consequence"). This flagrant rewriting of the statute has caused significant harm to children with disabilities. Justice is not merely delayed for those children; the spectre of months or years of costly and categorically futile proceedings before being allowed to seek the relief they plainly possess under civil rights laws deters many from seeking justice in the first place.

Civil rights laws provide students with disabilities a number of substantive rights, entitlements, and protections that do not co-exist under special

education law. For example, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq.*, and its implementing regulations, 28 C.F.R. Part 35, expressly allow a child with a disability to bring her service dog to school, *id.* § 35.136(g). The ADA prohibits discrimination on the basis of disability, requires schools to be made accessible to students with disabilities, and prohibits such students from being "excluded from participation in, or be[ing] denied the benefits of the services, programs, or activities" of the school. *Id.* § 35.149. Schools are also required to "furnish" a student with a communication-related disability the "auxiliary aids and services" requested to ensure that their communications "are as effective as communications with others" in order to provide "an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity" of the school. *Id.* § 35.160(a)(1), (b). The IDEA provides no such rights.

When substantive civil rights like these are violated, students are entitled to seek relief in the form of either damages or equitable remedies, like a declaratory judgment or preliminary injunction. Few IDEA hearing officers have the authority to award such relief for the violation of a right that does not exist under the IDEA. In other words, as IDEA hearing officers routinely note in rejecting jurisdiction over such claims, the special education administrative process *as a matter of law* cannot provide relief for violations of *other* statutes where the right at issue is absent from the IDEA.

The Sixth Circuit's command to suffer *additional* months or years of civil rights violations without access to justice is inflicted on the population least able to endure such harm—children with disabilities.

Critical development time is wasted without relief from infringements on their rights, including the ability to attend school free from discrimination and to access the independence, opportunities, and supports to which they are entitled.

Any concern that children with disabilities will abuse their statutory right to access the courts is unfounded. Children do not lightly sue their teachers. Moreover, because IDEA hearing officers, who in some states need not even be lawyers, have no authority to provide the relief sought, the claims for relief will almost certainly end up in court anyway. Requiring children to endure a pointless administrative process wastes rather than conserves public resources. Denying a certain class of individuals with disabilities the ability to seek relief expressly granted to them by Congress is discriminatory.

In 1990, Congress found that persons with disabilities "have often had no legal recourse to redress ... discrimination," 42 U.S.C. § 12101(a)(4), and articulated as a central purpose of the ADA "to provide clear, strong, consistent, *enforceable* standards *addressing* discrimination against individuals with disabilities," *id.* § 12101(b)(2) (emphases added). Second-guessing the relief sought by children with disabilities and dictating the path by which they *must* seek enforcement of their independent rights is paternalistic and imposes on them a stricture that is not imposed on other plaintiffs. Congress expressly sought to remedy such "overprotective rules and policies" when it enacted the ADA. *Id.* § 12101(a)(5).

ARGUMENT

I. Misreading the HCPA To Impede Access to Justice Contravenes National Values and Decades of Concerted Legislative Efforts To Eradicate Such Barriers.

Our nation was founded to secure liberty, justice, and rights of redress for its citizens.[2] Over our nearly 250-year history we have progressively endeavored to ensure that *all* citizens—regardless of race, heritage, gender, sexual orientation, age, and ability—obtain equal rights, equal protection, and equal access to justice. While not without the occasional notable detour, as Dr. Martin Luther King observed, "the arc of the moral universe is long, but it bends toward justice."[3] The depth, breadth, and consistency of this commitment to the rights of liberty, justice, and equality are the foundation of our country's strength and resilience.

The founders established a robust judicial system to protect citizens against threats to those rights. Alexander Hamilton is well known to have said that

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[2] See, *e.g.*, U.S. CONST. pmbl. ("in Order to form a more perfect Union, establish Justice, ... and secure the Blessings of Liberty to ourselves and our Posterity"); *id.* amend. I ("Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."); *id.* amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ...."); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens ...; nor deny to any person ... the equal protection of the laws.").

[3] Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march.

"the first duty of society is justice." To that end, the judiciary's role is to protect against unconstitutional laws ensuring that the accretion, erosion, and administration of civil rights is not capricious. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Just as the universe of people protected by our laws has expanded, so has access to the court system to enable enforcement of those rights. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 522-23, 524, 525 (2004) (finding Congress enacted the ADA "against a backdrop of pervasive unequal treatment," "systematic deprivations of fundamental rights," and a "pattern of unconstitutional treatment in the administration of justice," and to enforce "basic constitutional guarantees" like "the right of access to the courts," the "infringements of which are subject to more searching judicial review").

Within the last century, Congress has codified these rights and protections in statute, including in the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). Section 1983 dates to the post-Civil War era, extending to freed slaves the rights and protections of the U.S. Constitution and other laws. 42 U.S.C. § 1983.[4] And more recently, over the past 40 years, Congress has established and affirmed that individuals with disabilities

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[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...." 42 U.S.C. § 1983.

possess—and are entitled to enforce—"equality of opportunity, full participation," and the same rights in society as nondisabled individuals. 42 U.S.C. § 12101(a)(7); see also Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794; *Tennessee*, 541 U.S. at 536 (Ginsburg, J., concurring) (ADA "[i]nclud[ed] individuals with disabilities among people who count in composing 'We the People'"). These laws guarantee people with disabilities equal access, equal opportunity, and freedom from discrimination.

The Sixth Circuit's holding in *Fry* eviscerates the civil rights expressly granted to children with disabilities, and flies in the face of our country's core values as repeatedly affirmed in decades of Congressional efforts to protect and expand those rights. Having been granted the indisputable right to bring a service dog to school under the ADA, and the right to relief in the form of money damages for the school's violation of this civil right, E.F. was prevented from accessing justice to enforce those rights. The requirement that E.F. undergo a lengthy administrative proceeding that cannot as a matter of law provide the remedy she seeks renders impotent the rights expressly granted to her under the ADA. The inequity inherent in this result is especially stark when considering that E.F. would face no such obstacle in redressing a violation of her right to bring her service dog to an *after*-school program at the same school. The decision below undermines the fundamental principle embedded in this country's founding and reinforced in repeated legislative efforts ever since that the ability to enforce a right necessarily accompanies the possession of that right.

Without the ability to enforce it, the right does not exist.

The Sixth Circuit's rewriting of the HCPA effectively destroys the fundamental rights and equal protections Congress granted to children with disabilities under the civil rights laws. Delaying justice to children with disabilities, forcing them to first endure months and years of a futile administrative proceeding, denies them that justice.

II. Preventing Children with Disabilities from Accessing Justice Causes Significant Harm.

This case is about access to justice. When a child's civil rights are violated, the child has a fundamental right to seek redress. Congress enacted the HCPA to affirm its longstanding intent to provide children with disabilities strong civil rights protections and to ensure they are able to seek the remedies available under those laws for violations of those rights. See H.R. REP. NO. 99-296, at 4 (1985) (HCPA intended to "reaffirm ... the viability of [civil rights] statutes as separate vehicles for ensuring the rights of handicapped children"). The sole exception to the right of a child with a disability to seek relief in court from a civil rights violation is when the child seeks relief that is identical to what is afforded to him under the IDEA. 20 U.S.C. § 1415(*l*). In those limited situations, the child must seek the relief first through the IDEA's administrative hearing process. *Id.*

When, however, a student with a disability like E.F. "seek[s] relief that is ... available under" a civil rights law but that is *not* available under the IDEA, the student need not go through the IDEA administrative process. *Id.* There would be no point to such an exercise.

Contrary to the opinion of the lower courts in this case, the question is not whether the relief sought "implicate[s] issues relating to [an] [individualized education program]," *E.F.* v. *Napoleon Community Schools*, No. 12-15507, 2014 WL 106624, at *5 (E.D. Mich. Jan. 10, 2014), *aff'd*, *Fry* v. *Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *and cert. granted*, 136 S. Ct. 2540 (2016); Pet. App. 49, or whether the claims "relate to the specific educational purpose of the IDEA," *Fry*, 788 F.3d at 625; Pet. App. 6. The only relevant question under the statute is whether the "relief [sought] is also available under" the IDEA. 20 U.S.C. § 1415(*l*). When it is not, children may seek the relief available to them under the civil rights laws, even when the relief sought might have something to do with the child's education. Any contrary interpretation not only violates the plain language and clear intent of the statute, but also inflicts significant harms on children with disabilities.

E.F.'s civil rights were violated when she was refused access to school with her service dog Wonder, a right of access expressly granted to her under the ADA.[5] 28 C.F.R. § 35.136(g). To remedy that violation, E.F. sought relief available to her under the ADA in the form of monetary damages. The lower courts closed the door on her attempt to seek this relief because she had not yet endured the lengthy and costly—yet completely futile—administrative hearing process under the IDEA, even when there was no question that E.F. was not "seek[ing]" *any* "relief" "available" under the IDEA.

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[5] A video of E.F. working with Wonder is available here: https://youtu.be/PIfyHn2_lmE.

The Sixth Circuit's rewriting of the HCPA denied E.F. access to justice and her right to seek a remedy for a violation of her civil rights. The harms E.F. experienced are not unique. Students with disabilities are routinely prevented from seeking justice when they experience discrimination. They face obstacles not faced by adults, or by children with disabilities in other settings.

A. The Sixth Circuit's Decision Hinders Children with Disabilities from Seeking Equitable Relief for Disability Discrimination and Other Violations of Their Civil Rights.

Because monetary damages are a form of "relief" that is not "available" under the IDEA, 20 U.S.C. § 1415(*l*), the relief E.F. seeks, which clearly *is* "available" under the civil rights laws—falls squarely within the exception to the HCPA exhaustion requirement.

In addition to monetary damages, civil rights laws like the ADA, Section 504, and Section 1983 afford children with disabilities the ability to seek *equitable* relief for violations of their civil rights. See, *e.g.*, 42 U.S.C. § 1983 (authorizing a "suit in equity"); *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 289 (2d Cir. 2003) (neither Section 504 nor Title II of the ADA "displays any intent by Congress to bar a suit [for injunctive relief] against state officials in their official capacities"). When a child is discriminated against on the basis of disability, or when she is unable to access a public service because of a failure to be furnished with reasonable supports or communication aids, for example, she is entitled to seek, among other forms of relief, a declaratory judgment that the school has violated her rights, and a prelim-

inary injunction to enforce her rights during the pendency of any litigation. *Id.* at 290; 42 U.S.C. § 1983 (authorizing "declaratory relief").

The IDEA, a spending clause statute aimed at ensuring students with disabilities are provided a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), has a significantly different purpose and reach than the civil rights laws that protect those same students, including the ADA, Section 504, and Section 1983. The IDEA provides procedural protections and substantive entitlements, but the provision of access, services, and accommodations to children under that law largely depends on who wins a fact-intensive debate about whether such things are "appropriate" for the child, a narrow and imprecise standard that, in application, is untethered to the child's civil rights. As Petitioners point out, the IDEA offers "limited substantive protection," "guarantee[ing] only a 'basic floor of opportunity'" rather than "'equal' educational opportunities,'" the latter of which *are* guaranteed to students with disabilities under civil rights laws. Pet. 4-5 (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 198, 201 (1982)).

By contrast, the civil rights laws provide affirmative protections and substantive rights of access and entitlements to students with disabilities, obligations that in many cases exceed what is required of school districts under the IDEA. A child who seeks equitable relief for a violation of such rights in the school context—even when such relief cannot be obtained under the IDEA hearing process because the protections categorically do not co-exist under the IDEA—is prevented from seeking such relief in the circuits that have adopted the Sixth Circuit's position in *Fry*.

This misapplication of the IDEA exhaustion requirement prevents children with disabilities from seeking relief from violations of the rights they possess solely under civil rights laws when those rights are construed to have any relevance to education. In effect, the *Fry* decision and its brethren have caused children with disabilities to suffer *substantive* harms.

1. Children with Disabilities Are Denied the Ability To "Seek Relief" Under the IDEA Administrative Process from Violations of Their Civil Rights.

The first appellate case to misinterpret the HCPA found that a fruitless IDEA hearing was a prerequisite for a fourth-grader to seek relief from disability-based harassment and discrimination committed by his teacher and classmates. *Charlie F.*, 98 F.3d at 992. Charlie F.'s counsel pointed out that, because the IDEA provides no general protection or entitlement against disability-based discrimination, the relief Charlie F. sought was not available under the IDEA administrative hearing process. And yet, the Seventh Circuit decided that administrative exhaustion could not be avoided by seeking ADA and Section 504 relief that was unavailable under the IDEA, a result that cannot be reconciled with the plain language of the IDEA. *Id.* Charlie F. could not file a civil action in court to seek the relief to which he was entitled under the ADA and Section 504 to remedy the violation of his civil rights until he had jumped through an onerous hoop that could not provide him the relief he sought. *Id.*

The ADA also provides that public facilities, including schools, be physically accessible to students with mobility impairments. 28 C.F.R. §§ 35.133,

35.137. The U.S. Department of Education's Office of Civil Rights (OCR) noted in its May 2012 determination regarding the violation of E.F.'s civil rights, that limiting a student's ability to choose a particular mobility aid "would inappropriately inhibit the student's independence and result in discrimination." Joint Appendix 35. For example, the OCR observed that a school would violate the antidiscrimination requirements of the ADA and Section 504 "if it required a student who uses a wheelchair to be carried or if it required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane." *Id.*

As the OCR noted, there is no concomitant obligation under the IDEA that a school ensure a student with a mobility impairment be able to access all areas of the school. *Id.* Thus, a student in a wheelchair who cannot access the fourth floor of the school building to take an elective music class (not required for him to receive a "free appropriate public education") because the elevator only reaches the third floor, would have the right to seek relief under the ADA and Section 504, but would not be able to seek relief under the IDEA.

Another example of a right absent from the IDEA but provided under civil rights laws is the right to be "furnish[ed]" with "[t]he type of auxiliary aid or service necessary to ensure effective communication ..., *giv[ing] primary consideration to the requests of individuals with disabilities* ... in a timely manner." 28 C.F.R. § 35.160(b)(1) & (2) (emphasis added). The ADA's effective communication regulations are intended to remedy the "discriminatory effects of ... communication barriers," 42 U.S.C. § 12101(a)(5),

and "to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of" a public service or program, 28 C.F.R. § 35.160(b)(1).

No such right is provided to students with disabilities under the IDEA. An "individualized education program" could include an assistive communication device, but there is no obligation under the IDEA to furnish that student with his requested method in a timely manner. See *K.M. ex rel. Bright* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, *and cert. denied*, 134 S. Ct. 1494 (2014) (concluding school district obligations under the IDEA and ADA with regard to communication supports "are significantly different").[6]

Whereas school teams can refuse to provide effective communication auxiliary aids and services, permit a service dog in school, or ensure access to the elective class on the fourth floor, if such things are not necessary to ensure a student's minimal educational progress, they cannot, with rare exceptions, be refused under the ADA. See *Fry*, 788 F.3d at 633 (Daughtrey, J., dissenting) ("the two anti-discrimination laws and the IDEA could function as complements, but their focus and the obligations that

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[6] See also U.S. Department of Justice & U.S. Department of Education, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools at 1 (Nov. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf ("Public schools must comply with all three laws [the ADA, Section 504, and the IDEA], and while compliance with one will often result in compliance with all, sometimes it will not.").

they impose are independent of one another"), Pet. App. 24.

These examples of substantive standards afforded under civil rights laws but not under the IDEA demonstrate a variety of circumstances in which a child with a disability might experience a civil rights violation but have no way to "seek relief"—either equitable or monetary—for that violation because IDEA hearing officers cannot award equitable or monetary relief for the violation of a right or standard that is not available under the IDEA. There is no way students with service dogs or physical or communication-related disabilities could possibly obtain the relief of a declaratory judgement or preliminary injunction through the IDEA administrative hearing process.[7]

The correct, straightforward reading of the HCPA is that it would *not* mandate that students with disabilities go through the IDEA administrative hearing process before being able to seek relief under the civil rights laws. Equitable relief for violations of civil rights that do not co-exist under the IDEA are

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[7] Significantly, school districts, and even some courts, have claimed that the IDEA's exhaustion requirement somehow absolves school districts from the obligation to comply with civil rights laws as long as they comply with the IDEA. See, *e.g.*, Letter from Francisco M. Negrón, Jr., Gen. Counsel, Nat'l Sch. Bds. Ass'n, to The Hon. Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., et al., at 3-4 (Mar. 5, 2015), https://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf; see also Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY, Iss. 2, 611, 626-27 & n.80 (2012), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1154&context=naalj.

not "available" to be "sought" under the IDEA administrative hearing process. An IDEA hearing officer simply has no authority to enforce or relieve disability-based discrimination, or the ADA's effective communication, service dog, or equal access provisions. Because the relief sought by students for violations of those rights is not available under the IDEA to be "sought," there is no reason for such students to "exhaust" under the IDEA. Forcing them to do so is as futile as it is for E.F., where the relief she seeks—monetary damages—is simply unavailable under the IDEA.

The Sixth Circuit's holding in *Fry* misreads a narrow spending clause statute and deprives students with disabilities of equal protection and civil rights, a result Congress clearly did not intend.

B. E.F. Is Not Alone

Amici and their members have firsthand experience with the challenges students with disabilities like E.F. routinely face around the country when asserting their civil rights in school. Requiring children to go through an onerous but futile administrative process before being able to seek relief for violations of their civil rights is costly and emotionally draining, and serves to deter many from asserting their rights in the first place.

1. Second Circuit: New York's S.W.

In July 2012, the parents of S.W., a nine-year-old with autism spectrum disorder, retained a lawyer to seek equitable relief for a violation two months earlier by the Sachem Central School District of his ADA right to bring his service dog to school. Because of the Second Circuit's *Fry*-equivalent, *Cave* v. *E. Meadow Union Free Sch. Dist.*, 514 F.3d 240 (2d Cir.

2008), S.W. was prevented from seeking relief from the civil rights violation until he exhausted New York's especially lengthy, two-tier IDEA administrative hearing process. He filed a hearing request in October 2013.

S.W.'s first IDEA hearing took nine days, spread out over several months in 2014. The school district appealed to the second tier in New York's process, and a final decision was issued in March 2015, determining that neither IDEA hearing officer had jurisdiction over S.W.'s ADA and Section 504 claims and that the child therefore was not entitled to relief under the IDEA administrative hearing process.

In May 2015, after enduring more than nineteen months of a fruitless IDEA administrative hearing process and nearly three years since the school first violated his civil rights, S.W., with the assistance of *Amicus* Disability Rights New York, filed for enforcement of his ADA and Section 504 rights in federal court, something he would have been able to do in May 2012, had the HCPA been interpreted correctly by the Second Circuit in *Cave. Child with Disability* v. *Sachem Cent. Sch. Dist. Bd. of Educ.*, No. 2:15-cv-02903-SJF-ARL (E.D.N.Y. filed May 19, 2015). S.W. was unlawfully and unnecessarily prevented from seeking equitable relief, including a preliminary injunction, for the deprivation of his right to access school with his service animal.

2. Fourth Circuit: North Carolina's A.S.

At the start of the 2010-2011 school year, a school district in North Carolina refused to permit four-year-old A.S., a student with developmental disabilities, to bring his service animal, Chatham, to school. When efforts to resolve the issue informally failed,

A.S., represented by *Amicus* National Disability Rights Network member Disability Rights North Carolina, filed an action in federal court under the ADA and Section 504. *A.S. ex rel. Leonel S.* v. *Catawba Cty. Bd. of Educ.*, No. 5:11CV27-RLV, 2011 WL 3438881 (W.D.N.C. Aug. 5, 2011). A.S. sought a declaratory judgment that the school district had violated the ADA and Section 504, an injunction requiring the district to allow him to bring his service animal to school, and monetary damages. *Id.* at *2. The court dismissed for failure to exhaust under the IDEA. *Id.* at *7-8.

Following dismissal, A.S. filed a request for an administrative hearing. The hearing officer agreed with the parents that there were no IDEA claims and dismissed the ADA and Section 504 claims, citing a lack of jurisdiction over those claims. In the meantime, A.S. also filed a complaint with the OCR and the case resolved soon thereafter.

The misinterpretation of the HCPA forced A.S. to pursue a useless IDEA administrative process, and to attend school for an entire school year without access to his service animal.

3. Tenth Circuit: New Mexico's A.F.

A.F., a teenager with dyslexia near Los Alamos, New Mexico, filed a suit for damages against Española Public Schools in August 2012 under Section 1983, Section 504, and the ADA, *after* resolving through mediation and a binding resolution agreement her IDEA claims regarding the district's failure to evaluate or identify her for suspected disability and eligibility for special education. *A.F. ex rel. Christine B.* v. *Española Pub. Schs.*, 801 F.3d 1245, 1251-53 (10th Cir. 2015) (Briscoe, C.J., dissenting).

The suit sought, among other relief, damages for disability discrimination, emotional distress, and loss of equal educational opportunities. *Id.* at 1253.

Although there was no IDEA claim left to exhaust and the remedy sought—damages—was not available under the IDEA, the Tenth Circuit nevertheless affirmed dismissal of the suit for failure to exhaust administrative remedies under the IDEA. *Id.* at 1250-51 (majority opinion).

4. First Circuit: Puerto Rico's A.V.R.

In a 2015 example from Puerto Rico, A.V.R., a girl with a disability, sued the Puerto Rico Department of Education under the ADA seeking injunctive relief and monetary damages for failure to ensure school facilities and equipment were wheelchair-accessible. *Rivera-Quiñones* v. *Dep't of Educ. of Puerto Rico*, 125 F. Supp. 3d 391 (D.P.R. 2015). The court dismissed the ADA claims for failure to exhaust the IDEA administrative process, because her claim "relates to the provision of a student's education," *id.* at 396, denying A.V.R. the opportunity to pursue preliminary injunctive relief under the ADA, and consigning her to a lengthy IDEA administrative process that could not address her ADA claims. The court also refused to grant preliminary injunctive relief under the IDEA in part because the administrative process had not been exhausted, disregarding the potential harms of prolonged discriminatory exclusion on young children. *Id.* at 394. If A.V.R. had been able to access the court on her ADA claim, she could have obtained injunctive relief as a matter of law

5. Seventh Circuit: Illinois's K.D.

Amicus Equip for Equality represented the family of K.D., a six-year-old boy with autism, in filing a

complaint and seeking and obtaining a temporary restraining order from the Sixth Judicial Circuit in Douglas County, Illinois, after K.D. was barred from attending summer school with his service dog, Chewey. *Nichelle Drew* v. *Villa Grove Cmty. Unit Sch.*, No. 2009CH27 (Douglas Cty. Cir. Ct., IL 2009), *aff'd, K.D.* v. *Villa Grove Cmty. Unit Sch.*, 936 N.E.2d 690 (Ill. App. Ct. 2010). Chewey is a yellow lab who was acquired and specially trained as a service dog to help calm K.D. and to prevent him from wandering.[8]

Despite K.D.'s clear right under the ADA to attend summer school accompanied by Chewey, his claim was brought under a state service animal access law to avoid a dispute that K.D.'s failure to exhaust IDEA remedies would bar relief sought under federal civil rights laws. In this case, exhausting IDEA claims would not have brought K.D. the relief sought because his parents did not contend that K.D. needed to be accompanied by his service animal to receive a free appropriate public education under the IDEA. The complaint merely sought enforcement of K.D.'s right to access school accompanied by Chewey.

Despite this calculated attempt to avoid the misapplication of the HCPA to their case, significant resources were expended to defend against the school district's insistence at every step in the litigation—the temporary restraining order hearing, the preliminary injunction hearing, the trial, and the appellate

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[8] See Patrick Yeagle, *Dog fight ends with hall pass: School admits second-grader with service dog*, ILLINOIS TIMES (Sept. 9, 2010), http://illinoistimes.com/article-7735-dog-fight-ends-with-hall-pass.html.

argument—that K.D. could not lawfully enforce his right to access school with Chewey before going through the IDEA administrative process. This is just one example where the misinterpretation of the HCPA has deterred potential plaintiffs from seeking to enforce their civil rights under federal law. Not every state has a state law remedy that enables students to avoid the futile, lengthy exhaustion that *Fry* requires. Children should not have to forego their federal civil rights to seek justice, and in most states that option will not be available.

6. Fourth Circuit: Virginia's "Arlington Five"

A final example is the "Arlington Five," five students between the ages of nine and nineteen with apraxia, a neurological condition that prevents them from using speech to communicate. In August 2014, the first member of the Arlington Five requested that his preferred effective method of communication—pointing to letters on a low-tech alphabet board to spell out words and sentences—be accommodated as an auxiliary aid and service at school.[9] Arlington Public Schools denied his, and each other student's request.

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[9] Letter from Samantha Crane, Legal Dir. & Dir. of Pub. Policy, Autistic Self Advocacy Network, to Rebecca B. Bond, Chief, & Anne Raish, Acting Principal Deputy Chief, Disability Rights Section, Civil Rights Div., U.S. Dep't of Justice at 7 (Mar. 7, 2016), http://autisticadvocacy.org/wp-content/uploads/2016/03/ADA-Discrimination-Complaint-Against-Arlington-Public-Schools.pdf; see also *id.* at 7-8, nn. 11-16 (providing links to videos of members of the Arlington Five communicating with an alphabet board).

In each case, the school district asserted that because the IDEA does not require it to provide the student's preferred method, they need not comply with their clear ADA obligation to do so. Instead, it offered other methods that were dramatically less effective. The Arlington Five cannot afford to go through a futile IDEA hearing process before seeking the relief to which they are entitled under the ADA, in part because three are close to aging out of public education and in part because four out of the five students can no longer tolerate the frustration of spending each school day without any effective form of communication. Only one of the Arlington Five remains enrolled in Arlington Public Schools. Without the ability to pursue their ADA claim, they are effectively prevented from independently enforcing their civil rights. Instead *Amicus* Autistic Self Advocacy Network, which represents the Arlington Five, has petitioned the U.S. Department of Justice to enforce the ADA on their behalf.

* * *

When the students identified above go to college, the obstacles they have faced at the elementary and secondary levels to accessing justice under civil rights laws will evaporate simply because the IDEA is no longer implicated. Earlier this year, deaf and hard of hearing students at Harvard University were able to go straight to court to seek injunctive and declaratory relief under the ADA and Section 504 for an alleged failure by the university to provide equal access to online audio and audiovisual content. *Nat'l Ass'n of the Deaf* v. *Harvard Univ.*, No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *1 (D. Mass. Feb. 9, 2016). As seniors in high school in the Sixth Cir-

cuit (or the First Circuit, where Harvard is located), they would have been unable to file that complaint.

None of the stark examples described in this brief would exist if the HCPA were interpreted in accordance with its plain language and Congressional intent. In each example, the students have clearly suffered civil rights violations, and in each case they have either been blocked from directly exercising their right to seek relief under civil rights laws, or have been deterred by the spectre of months and years of a futile administrative hearing process. During this time, if their families lack the resources to homeschool them, place them in a private school, or to move to another school district, they are forced to endure continued discrimination and violations of their rights while awaiting to access the courts as they are statutorily entitled. *Amici* are aware of many additional examples of families who have never even *sought* to enforce their children's civil rights because they could not afford—financially or emotionally—the prerequisite IDEA administrative process before being able to seek relief in court.

These unjust results will continue if *Fry* is not reversed.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, the judgment below should be reversed.

Respectfully submitted,

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